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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 761

61

IN THE MATTER

of

SEELEY TUBE AND BOX COMPANY,

Debtor-Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Debtor-Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Seeley Tube and Box Company, a corporation of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing a judgment of the United States District Court for the District of New Jersey. Petitioner respectfully submits that the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported in 219 F. 2d 389. The opinion of the United States District Court for the District of New Jersey is reported in 120 F. S. 269. The opinion of the Referee in Bankruptcy is unreported but is printed in the Appendix hereto (App. 15a).*

Statement as to Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was rendered and entered on January 11, 1955. A rehearing was denied by that court on February 9, 1955. The jurisdiction of this Court to review the questions herein presented is invoked under Title 28 U. S. C. A., Section 1254(1).

Question Presented for Review

Can the schedules of a debtor in a Chapter XI proceeding be held to have been constructively amended so as to include an unscheduled creditor whose claim is in the category of clause (2) of Section 369 of the Bankruptcy Act, by the fact that at the hearing on confirmation of the debtor's plan of arrangement its attorney stated that the creditor might have a claim in the category of clause (3) of Section 369 of the Bankruptcy Act and the Referee then made an order to show cause why the creditor's time to file a claim should not be limited?

Statutes and General Orders Involved

This case involves Sections 39(a)(3), 324, 367(4) and 369(2) of the Bankruptcy Act [11 U. S. C. A. §67(a)(3),

* We thus refer to papers printed in the Appendix hereto.

§724, §767(4) and §769(2)], General Orders 11 and 38, and Official Form 48 [11 U. S. C. A. foll. §53]. The texts of these statutory provisions, orders and official form are set forth in the Appendix.

Statement of the Case

This is a petition for certiorari to review a judgment of the United States Court of Appeals for the Third Circuit reversing a judgment of the United States District Court for the District of New Jersey. The judgment of the United States District Court for the District of New Jersey determined that the Bankruptcy Court lacked jurisdiction to allow a claim of the United States of America filed after the confirmation of petitioner's plan or arrangement, because the claim was one which had not "been scheduled by the debtor" within the meaning of Section 369(2) of the Bankruptcy Act. The judgment of the United States District Court for the District of New Jersey, on a petition to review an order of the Referee in Bankruptcy which allowed the Government's claim, reversed that order.

On October 1, 1946 petitioner filed its petition for an arrangement under Chapter XI of the Bankruptcy Act. The schedules filed by petitioner did not list the United States of America as a creditor. A statement of its executory contracts filed by petitioner included contracts with the United States of America. Petitioner's plan of arrangement did not include a provision for the rejection of those contracts.

After petitioner filed its petition for arrangement, the United States of America gave notice to petitioner of its intention to terminate the said contracts by reason of petitioner's default and thereafter terminated the contracts.

Petitioner's amended plan of arrangement came on for hearing before the Referee in Bankruptcy on March 21,

1947. An attorney named Mr. Ryan, representing the Bureau of Internal Revenue, was present. Petitioner was represented at the hearing by Mr. Freeman. Near the outset of that hearing the following colloquy took place:

> "The Referee: Whom do you appear for, Mr. Ryan?
>
> Mr. Ryan: The Bureau of Internal Revenue.
>
> Mr. Freeman: Mr. Ryan wants to be heard before your Honor signs the order.
>
> Mr. Ryan: My instructions are only to appear here and say that the United States Government does not waive its right to the deposit of sufficient funds to pay additional taxes as required by the National Bankruptcy Act as amended, specifically Sections 337(a) and 361, as a prerequisite to the confirmation of the plan of arrangement."

Later in the hearing, Mr. Freeman stated to the Referee, in substance, that he wished to obtain an order directing the United States of America (Picatinny Arsenal) to show cause why its time "to file a claim in this proceeding" should not be limited. In answer to the Referee's inquiry: "Is there a claim of the Picatinny Arsenal?" Mr. Freeman answered: "The Picatinny Arsenal may have some claim" and "We think they may claim $20,000.00." Thereupon, the following colloquy between the Referee and Mr. Freeman occurred:

> "The Referee: There is a provision in the statute—
>
> Mr. Freeman: Yes, there is.
>
> The Referee: I want to see it.
>
> Mr. Freeman: It is Section 369.
>
> The Referee: Section 369 says under proved debts: 1. Have been proved but not allowed or disallowed, prior to the date of confirmation: or 'unliquidated debts.'

2. Are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the Court may direct; or 'Arising from rejection of executory contracts.'

3. Arise from the rejection of executory contracts by the debtor and are proved within such time as the Court may direct.

This comes within the last category.

Mr. Freeman: Yes, that is the last category."

It is to be noted that both Mr. Freeman and the Referee were mistaken in supposing that a claim which the United States of America might have against petitioner would be a claim in the category of Section 369(3), that is, a claim arising from "the rejection of executory contracts by the debtor". Petitioner had not rejected its executory contracts with the United States of America. Those contracts had been terminated by the United States of America.

At or at the conclusion of the hearing on March 21, 1947, the Referee made an order confirming the amended plan of arrangement and made an order to show cause why the time of the United States of America to "file any claim which it may have against the said debtor in these proceedings" should not be limited.

Thereafter, on May 9, 1947, the United States of America filed with the Referee a proof of claim against petitioner and later filed amended and re-amended claims. Petitioner petitioned the Referee to reject and disallow those claims. The Referee made an order denying the prayer of the said petition, the order stating that it was made "in accordance with an opinion" previously rendered by the Referee. That opinion ended with the words: "I conclude, therefore, that the claim of United States of America has been filed within time."

Upon review of the Referee's order, the District Court made an order, dated April 26, 1954, reversing the Referee's order and adjudging that appellant's claim was not filed within time and that "the said claim is barred". The Circuit Court of Appeals reversed the judgment of the District Court on the ground that the above quoted colloquy between the debtor's attorney and the Referee at the hearing on the confirmation of the plan of arrangement "amounted to an informal amendment of the list of creditors included in the debtor's schedules" and consequently the claim filed by the United States of America after the date of the order of confirmation of the debtor's plan of arrangement, was one which the Referee had jurisdiction to allow under Section 369(2) of the Bankruptcy Act.

ARGUMENT

The determination of the Court below that the claim of the United States of America was "scheduled by the debtor before confirmation of the plan" (App. 5a) was plainly erroneous, being based on an erroneous holding that the statement by debtor's attorney at the hearing on confirmation "amounted to an informal amendment" of the debtor's schedules. That this latter holding was erroneous is even manifest in the very reason which the Court below gives for that holding. The Court's reason is: "For otherwise the Government *merely because of the debtor's failure to schedule its claim* will be wholly precluded from participating in the distribution of the funds provided for by the arrangement, *In re Super Electric Products Corp.*, 3 Cir., 1953, 200 F. 2d 790, while all other creditors receive 100% of their claims in cash" (App. 6a). If, as the Court below here acknowledges, the debtor failed to schedule the Government's claim, it is difficult to understand how the court paradoxically could reach the conclusion that the Government's claim, filed after confirmation of the debtor's

plan of arrangement, was a claim "scheduled by the debtor before confirmation of the plan" (App. 5a).

That the holding of the Court below that the statement by the debtor's attorney at the hearing on confirmation "amounted to an informal amendment" of the debtor's schedules was erroneous, is readily demonstrable. In the first place, it is not true, as the court says, that there was a "disclosure by the debtor at the hearing on confirmation of the plan that the Government had become a creditor." What the debtor's attorney actually said was, not that the Government *had* a claim but that it *might* have a claim. In this regard, the following colloquy between the Referee and the debtor's attorney occurred:

> "The Referee: Is there a claim of the Picatinny Arsenal?
>
> Mr. Freeman: The Picatinny Arsenal may have some claim. * * *
>
> Mr. Freeman: We do not owe them any money, and we want to bring them in."

Hence this statement of the debtor's attorney was neither an assertion by the debtor that the Government had a claim nor a declaration by the debtor that the Government itself asserted that it had a claim.

Yet, aside from the foregoing, there is one reason which alone is all-sufficient to demonstrate the incorrectness of the questioned holding of the court below. This reason is that the Bankruptcy Act makes no provision for and does not permit of an amendment of the debtor's schedules by a statement (a) made orally, (b) not under oath, (c) by debtor's attorney, (d) not purporting to amend the schedules.

Section 324 of the Bankruptcy Act (being part of Chapter XI) provides that "The petition shall be accompanied by—(1) a statement of the executory contracts of the

debtor, and the schedules and statement of affairs, if not previously filed: * * * ". General Order 11 in Bankruptcy provides as follows:

> "The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

The official form of original petition in proceedings under Chapter XI prescribed by the United States Supreme Court and designated form No. 48 contains, *inter alia*, the following paragraph, viz:

> "4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy."

Here, then, is an explicit and absolute requirement of law that schedules in a Chapter XI proceeding be filed (a) by the debtor, (b) in writing, and (c) under the debtor's oath.

Moreover, Section 39(a)(3) of the Bankruptcy Act, which, as this Court said, applies to a Chapter XI proceeding, provides that "Referees shall * * * (3) examine all schedules of property, lists of creditors, and statements of affairs, filed as provided under this Act, and *cause* such as are incomplete and defective *to be amended;*

(4) * * * ". Clearly this provision intends not that the Referee himself shall amend schedules but that he shall cause them to be amended by the debtor.

Thus, Section 324, General Order 11, Official Form No. 48 and Section 39(a)(3) concur in requiring that the debtor's schedules shall be filed and, if need be, shall be amended (a) by the debtor, (b) in writing, and (c) under oath. Consequently, a holding by this Court that a debtor's schedules can be regarded as amended by virtue of a statement made (a) orally, (b) by the debtor's attorney, (c) not under oath, and (d) not purporting to amend the schedules, contravenes the Bankruptcy Act and in effect constitutes a judicial amendment of the Bankruptcy Act. The notion that where, by the express provisions of the Bankruptcy Act, the Bankruptcy Court's jurisdiction depends upon whether or not a debt has been scheduled, an appellate court is free to construct an assumption, contrary to fact, that the debt has been scheduled, introduces into the bankruptcy law a novel and alien concept whose disturbing and problematical effect on future cases is more than likely to outweigh immeasurably any supposedly desirable result which it might be thought to achieve in the instant case. For one thing, the sustaining of the holding in question would make it possible for creditors in countless cases to contend that the Court should treat their claims, contrary to fact, as if they were scheduled, on the ground that statements made at one hearing or another should be deemed *ipso facto* to have operated to amend the schedules so as to include their claims.

Nor can the Court's treatment of the Government's claim *as if* it were a debt which had been scheduled be justified on the ground that the equitable powers of that court allow it to do this as a matter of equity. For, it is well established that the equitable powers of a court of bankruptcy lie wholly within the boundaries of the provisions

of the Bankruptcy Act and do not extend beyond those boundaries. As the Court said in the case of *Evarts* v. *Eloy Gin Corp.*, 204 F. 2d 712, 715, the equity jurisdiction of a Bankruptcy Court "is not plenary equity jurisdiction. It is a bankruptcy jurisdiction, limited to the express statutory authorizations", citing among other cases the case of *Pepper* v. *Litton*, 308 U. S. 295, 304.

In reality, it was the Government's fault that its claim did not get to be scheduled before the date of the hearing on confirmation of the plan of arrangement. Before that time the Government could and should have ascertained that it was not listed in the debtor's schedules and the Government should have applied to the Referee to cause the schedules to be amended to include it. What the Court of Appeals' challenged holding does, then, is to exempt the Government from the liability for a loss which is normally entailed upon a creditor who neglects to take steps required of him by the Bankruptcy Act in order to protect his interests. It is plainly foreseeable therefore that the sustaining of the holding in question will give rise to an endless variety of controversies in bankruptcy in which unscheduled creditors who have neglected to make a timely application to the Bankruptcy Court for a permissible amendment of the schedules, will contend that a particular set of facts or circumstances operates to relieve them from the harmful consequences of their neglect.

The case of *Everick Art Corporation*, 39 F. 2d 765 (C. A. 2) cited by the court below, lends no support to the holding in question. In that case the bankrupt's schedules *listed* two unsecured creditors, without giving any amounts and with a statement that the claims were disputed. The bankrupt offered a composition with creditors and made a deposit which did not cover the claims of the said two creditors. The Referee confirmed the composition. Thereafter, these two creditors filed proofs of claim and petitioned the Referee to require the bankrupt to deposit a sum

of money to pay them the percentage of their claims paid to the other creditors. The Referee refused to make such an order, holding that he had no jurisdiction to make it. On appeal, the court held that the Referee should have caused the bankrupt's schedules to be amended *to show the amounts* of the claims of these two *scheduled* creditors and that then the Referee should have required the bankrupt to make a deposit of a sum sufficient to cover these amounts, even though the claims were stated *in the schedules* to be disputed. The court said that the Referee should have taken this action before confirming the composition. Here, it is to be noted, the two creditors *were listed in the bankrupt's schedules,* and only the *amount* of their claims was unstated. Obviously, the case was unlike the case at bar where, admittedly, the Government was *not named* in the debtor's schedules.

Not only does the holding of the court below contravene the Bankruptcy Act, but the court arrived at that holding by a course of reasoning which manifestly involves errors both in point of fact and in point of logic. This course of reasoning, stated in the court's own language, is as follows:

> (1) "When that [the Government's] claim arose it became the debtor's duty to amend its schedules to disclose it." (App. 5a)
>
> (2) "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor* was therefore in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." (App. 5a)

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* The debtor's attorney did not say that "the Government had become a creditor" but that the Government *might* have a claim.

(3) "It was the duty of the referee under section 39(a)(3) of the Bankruptcy Act to cause any incomplete schedules coming to his attention to be amended." (App. 6a)

(4) "Having heard the debtor's counsel state in open court the existence and amount of the Government's claim* we must assume that, in pursuance of this duty, the referee approved the statement as an informal amendment of the debtor's schedules." (App. 6a)

(5) The referee's "action in fixing a subsequent time for proof of the Government's claim necessarily involved such approval. For such action could only have been validly taken, after confirmation of the plan, on the premise that the Government's claim had been scheduled before the order of confirmation was entered." (App. 6a)

The first proposition, hereinabove designated "(1)" is as follows: "When that [the Government's] claim arose it became the debtor's duty to amend its schedules to disclose it." This proposition assumes, contrary to fact, that there was a time, prior to the hearing on confirmation, when the Government's claim *arose*. In fact, there is no evidence that any claim of the Government arose prior to the hearing on confirmation. All that appears is that the Government had terminated a contract with the debtor and that in consequence the Government *might* have a claim if it should thereafter appear that the Government (a) subsequently entered into a contract with a third person to perform the same work and (b) paid that third person a sum in excess of the price stated in the Government's contract with the debtor. Unless and until these two possible future events occurred, it could not be said that a claim of the Government "arose". Obviously, these

* The debtor's attorney did not assert "the existence and amount of the Government's claim" but merely stated that the Government *might* have a claim and *might* claim $20,000.00.

events had not yet occurred when the hearing on confirmation was held.

The second proposition hereinabove designated "(2)" is as follows: "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefore in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." This proposition assumes, contrary to fact, that there was a "disclosure by the debtor at the referee's hearing on confirmation that the Government had become a creditor" (App. 5a). The fact is (1) that the statement made at the hearing on confirmation was made not by the debtor but by the debtor's attorney and (2) that the statement was not that the Government had become a creditor but that the Government *might* claim to be a creditor. Up to that time, the Government had not claimed that it was a creditor, nor did the Government's attorney, present at the hearing, make any such claim. Moreover, the statement by debtor's attorney did not purport to be a "disclosure" of an unscheduled claim within clause (2) of Section 369, but explicitly (and mistakenly) purported to be a recognition by the debtor's attorney that the Government might have a claim within clause (3) of Section 369, *which did not require a claim to be scheduled.* To treat this statement by the debtor's attorney as a "performance of its [the debtor's] duty under the Act" to amend its schedules so as to include an unscheduled claim, is not to effectuate the statement of the debtor's attorney but to contradict it and to convert it arbitrarily into a totally different statement, thereby attributing to the debtor's attorney an intent which the evidence shows he never had.

The third proposition, hereinabove designated "(3)" is as follows: "It was the duty of the referee under section 39(a)(3) of the Bankruptcy Act to cause any incomplete schedules coming to his attention to be amended." This proposition assumes, contrary to fact, that the referee's

attention was called to the (alleged) fact that the debtor's schedules were incomplete and required amendment in respect of a claim of the Government. In fact, however, what was brought to the Referee's attention (1) was not the existence of a claim of the Government but the possibility that the Government might thereafter have a claim and (2) was a mistaken belief on the part of the debtor's attorney that the Government might have a claim within clause (3) of Section 369, *under which clause there is no requirement that the claim be scheduled.*

The fourth proposition, hereinabove designated "(4)" is as follows: "Having heard the debtor's counsel state in open court the existence and amount of the Government's claim we must assume that, in pursuance of this duty, the Referee approved the statement as an informal amendment of the debtor's schedules." This proposition assumes, contrary to fact, that the debtor's attorney stated that the Government had a claim for a certain amount, when, in truth, what the attorney said was that the Government might have a claim and that this possible claim *might* be alleged to amount to $20,000.00. Moreover, the stated proposition also assumes, contrary to fact, that "the referee approved the statement as an informal amendment of the debtor's schedules" when in truth, as the record shows, the referee mistakenly supposed the possible claim of the Government to be one within Section 369(3), *under which clause there is no requirement that a claim be scheduled.*

The fifth proposition, hereinabove designated "(5)" is as follows: The referee's "action in fixing a subsequent time for proof of the Government's claim necessarily involved such approval. For such action could only have been validly taken, after confirmation of the plan, on the premise that the Government's claim had been scheduled before the order of confirmation was entered." This proposition assumes, contrary to fact, that the referee, in fixing

a time for the Government to prove a claim, did so in the belief that the claim was one which was within clause (2) of Section 369 and so was one which required scheduling, whereas in truth, as the record shows, the referee acted on the mistaken belief that the possible claim of the Government was one within clause (3) of Section 369, *which does not require that a claim be scheduled.* Furthermore, the stated proposition involves the creation of a legal fiction whereby an intention is arbitrarily imputed to the referee because an act of his would be *coram non judice* unless it was done with such an intention. The intention referred to is the (imputed) intention on the referee's part to treat the statement of the debtor's attorney "as an informal amendment of the debtor's schedules". The Court's reasoning here, stated in the form of a syllogism, is as follows, viz.:

1. The referee fixed a time for the Government to prove a claim;

2. This action on the referee's part was *coram non judice* unless the referee treated and approved the statement made by the debtor's attorney as being an informal amendment of the debtor's schedules;

3. Therefore, it will be assumed that the referee did treat and approve the attorney's statement as an informal amendment of the debtor's schedules.

This reasoning has two fundamental defects. One defect is that the reasoning involves an inarticulate premise to the effect that the Court is under some legal compulsion to hold that the referee's act, in fixing a time for the Government to prove its claim, was not *coram non judice.* The other defect is that the reasoning involves an inarticulate premise to the effect that a court has the power to impute an intention to a referee, contrary to his actual intention, where the imputation of such an intention is necessary to validate his act, challenged as being *coram non judice.*

CONCLUSION

We respectfully submit that the foregoing argument demonstrates that the Government's claim is a claim which the Bankruptcy Court lacked jurisdiction to allow inasmuch as it was *not* a claim in any of the three categories of Section 369 of the Bankruptcy Act and therefore, with respect to such claim the Bankruptcy Court's jurisdiction was terminated by virtue of Section 367(4) of the Bankruptcy Act. Therefore, petitioner respectfully prays that this Court may grant the prayer of this petition.

Dated: May 4, 1955.

Respectfully submitted,

BILDER, BILDER & KAUFMAN,
Attorneys for Debtor-Petitioner.

WALTER J. BILDER,
Of Counsel.

APPENDIX

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11378

In the Matter of

SEELEY TUBE AND BOX COMPANY,

Debtor.

UNITED STATES OF AMERICA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

MARIS, MCLAUGHLIN and KALODNER, Circuit Court Judges

This cause came on to be heard on the records from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same hereby is reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:
IDA O. CRESKOFF,
Clerk.

Dated: January 11, 1955.

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11378

In the Matter of

SEELEY TUBE AND BOX COMPANY,

Debtor.

UNITED STATES OF AMERICA,

Appellant.

SUR PETITION FOR REHEARING

Present,

MARIS, McLAUGHLIN and KALODNER, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court
MARIS,
Circuit Judge.

Dated: February 9, 1955.

Received and Filed Feb. 9, 1955
IDA O. CRESKOFF

Opinion of the United States Court of Appeals for the Third Circuit

MARIS, Circuit Judge.

On October 1, 1946, the debtor, Seeley Tube and Box Company, filed its petition in the District Court for the District of New Jersey for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 et seq. and on the same day the court approved the petition. With the petition the debtor filed the statement of excutory contracts and the schedules and statement of affairs required by section 324 of the Act. Included in the statement of executory contracts were six government contracts with the Picatinny Arsenal which had not then been declared in default. On October 1, 1946 the United States gave notice to the debtor of its intention to terminate two of these contracts because of the debtor's default in performance. On November 18, and 19, 1946 the contracts were terminated, the Government reserving the right in accordance with their terms to hold the debtor liable for damages. In reletting these contracts the Government was forced to pay a price in excess of that for which the debtor had promised delivery. This excess is the basis for the Government's claim here in controversy.

On February 28, 1947 the debtor filed an amended plan of arrangement which provided for the payment in cash of all unsecured debts without any reduction in amount or extension of the time for payment. A hearing on the confirmation of this amended plan was held by a referee on March 21, 1947, following which an order was entered confirming it. At that hearing counsel for the debtor stated that the Government might have a claim with respect to the Picatinny Arsenal contracts which might amount to $20,000 and he presented a petition for an order fixing the time within which the United States should file its claim growing out of said contracts. Such an order was entered fixing May 9, 1947 as the time. On May 9, 1947 the Gov-

ernment filed its proof of claim, amended March 30, 1949, for $34,125.03. On February 17, 1950 the debtor filed a petition seeking, inter alia, to have the claim re-examined and barred. The referee rejected the petition but on review he was reversed by the district court which held that the claim was not timely filed, and entered an order barring it. 120 F. Supp. 269. This appeal by the United States followed.

The following are the pertinent provisions of Chapter XI of the Bankruptcy Act:

> "Sec. 367. Upon confirmation of an arrangement—
>
> • • •
>
> "(4) except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed.
>
> "Sec. 368. The court shall retain jurisdiction, if so provided in the arrangement.
>
> "Sec. 369. The court shall in any event retain jurisdiction until the final allowance or disallowance of all debts affected by the arrangement which—
>
> "(1) have been proved, but not allowed or disallowed, prior to the date of confirmation; or
>
> "(2) are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the court may direct; or
>
> "(3) arise from the rejection of executory contracts by the debtor and are proved within such time as the court may direct." 11 U.S.C.A. §§ 767, 768, 769.

The debtor's contention, which the district court adopted, is that under section 367(4) of the Bankruptcy Act the court did not have jurisdiction after the confirmation of the plan of arrangement to allow the Government's claim since the claim did not come within any one of the three saving clauses of section 369. It is obvious that the claim did not

come within clause (3) of that section since the debtor had not rejected the contracts involved. We may also assume that it did not come within clause (1) as a claim proved prior to the date of confirmation, although the Government urges otherwise. We think, however, that the Government's claim did come within clause (2) of section 369 and that the district court accordingly erred in holding that it did not have jurisdiction to allow it after confirmation of the plan.

The claim was clearly a disputed or unliquidated one. Likewise it was proved within the time specifically directed by the court. Was it scheduled by the debtor before the confirmation of the plan? We think it must be held that it was thus scheduled within the meaning of section 369(2).

[1-3] Section 7 of the Bankruptcy Act, 11 U.S.C.A. § 25, requires the bankrupt to file a schedule of his property and a list of his creditors, including all persons asserting contingent, unliquidated or disputed claims. Section 324 of the Act requires these schedules to be filed by a debtor in an arrangement proceeding under Chapter XI. They must be filed with the debtor's petition or, with leave of court, within ten days thereafter. Carolina Motor Express Lines v. Blue & White Service, 7 Cir., 1951, 192 F.2d 89. Here the schedules were filed with the petition and included a statement of the executory contracts out of which the Government's claim subsequently arose. When that claim arose it became the debtor's duty to amend its schedules to disclose it. The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefore in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules.

[4] Amendments to the schedules are specifically authorized by General Order 11 in Bankruptcy, 11 U.S.C.A. following section 53, and are liberally allowed when required in the interest of justice. Such amendment was in

the interest of justice here. For otherwise the Government merely because of the debtor's failure to schedule its claim will be wholly precluded from participating in the distribution of the funds provided for by the arrangement, In re Super Electric Products Corp., 3 Cir., 1953, 200 F.2d 790, while all other creditors receive 100% of their claims in cash.

[5] It was the duty of the referee under section 39, sub. a(3) of the Bankruptcy Act, 11 U.S.C.A. § 67, sub. a(3), to cause any incomplete schedules coming to his attention to be amended. In re Everick Art Corporation, 2 Cir., 1930, 39 F. 2d 765. Having heard the debtor's counsel state in open court the existence and amount of the Government's claim we must assume that, in pursuance of this duty, the referee approved the statement as an informal amendment of the debtor's schedules. Moreover his action in fixing a subsequent time for proof of the Government's claim necessarily involved such approval. For such action could only have been validly taken, after confirmation of the plan, on the premise that the Government's claim had been scheduled before the order of confirmation was entered. The fact that the referee appears to have mistakenly thought that his order was also supported by section 369(3) of the Act we regard as immaterial.

[6] We conclude that the debtor's schedules must be regarded as having been informally amended with respect to the Government's claim to the extent needed to satisfy section 369(2) of the Bankruptcy Act. Certainly the informal scheduling of the claim disclosed by the record served all the purposes in this case which a more formal procedure would have accomplished. So regarded, the claim was proved in time and the district court has jurisdiction to entertain and allow it.

The order of the district court will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

Opinion of the United States District Court for the District of New Jersey

MODARELLI, District Judge.

This matter is before the court on a petition for review filed by Seeley Tube and Box Company, a corporation-debtor, pursuant to Section 39(c) of the Bankruptcy Act, as amended, 11 U.S.C.A. 67(c). The petition alleges generally that the Referee in Bankruptcy erred in denying the motion of the debtor to re-examine and bar a claim filed by the United States of America in proceedings under Chapter XI of the Bankruptcy Act. The Referee on December 28, 1953, decided that there was a timely filing of the claim which would enable the United States as a creditor to participate in the distribution of the money deposited pursuant to the provision of Section 367 of Chapter XI of the Act.

The decisive issue to be decided is: Whether there was a timely filing by the United States of its claim, as set forth by the Referee in his Certificate of Review.

On October 1, 1946, debtor filed its Petition and Schedules for an arrangement under Chapter XI, wherein it proposed to pay all general unsecured creditors whose claims were $1,000 or less 100% immediately upon confirmation of the arrangement, and to pay all other general unsecured creditors 100% six months after the confirmation. On that same day, Judge Smith of this Court adjudged that the petition had been properly filed under Section 322 of the Act, and having read the petition "proposing an arrangement with its unsecured creditors, and the Court being satisfied with the sufficiency of" the application, ordered the matter referred to a referee. On March 17, 1947, the Referee's order appointing the Distributing Agent, recited that the Court of Bankruptcy conducted a meeting of debtor's creditors "on due notice to all creditors and other parties in interest;" that at the meeting, debtor filed "writ-

ten acceptances of creditors on the proposed amended arrangement;" that the court considered the amended arrangement and "upon the further consideration of all matters and things required under the provisions of Chapter XI" of the Act, ordered debtor to file its application to confirm the amended arrangement on or before March 19, 1947; and the court fixed March 21, 1947, before the referee "as the time and place for the consideration of the confirmation of said amended arrangement, or any objection which may be filed thereto." On March 21, 1947, the referee's order confirming the amended arrangement recited that "no written objections have been filed by any creditors or by any parties in interest to the confirmation of said amended arrangement."

Thereafter, the United States' claim was filed on May 9, 1947, nearly two months subsequent to the date of the confirmation order. Debtor's argument is based on Sections 367(4) and 369 of the Act, which provide, in substance, that the case before the referee shall be dismissed when the arrangement is confirmed, except as to three types of debts, as to which jurisdiction shall be retained, viz., debts which

1. have been proved, but not allowed or disallowed, prior to the date of confirmation; or

2. are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the court may direct; or

3. arise from the rejection of executory contracts by the debtor and are proved within such time as the court may direct.

The debtor argues that the proceeding terminates, except as to any of the above-classified debts, when the order of confirmation is signed, as does the jurisdictional power

of the court. Since the United States' claim is not such a classified debt, our jurisdiction terminated on March 21, 1947, the date of the confirming order, and that the filing date by the United States on May 9, 1947, was untimely, as a result of which the claim must be barred.

It is undisputed that the United States' claim was not proved "prior to the date of confirmation." As to whether or not the claim was "scheduled by the debtor," the United States argues that certain representations by the debtor's counsel constituted a scheduling of the claim. The argument is based on a colloquy between the then presiding referee and Mr. Albert Freeman, attorney for the debtor, which occurred during the March 21, 1947, hearing on the amended arrangement. As a result of certain statements made by Freeman to the referee regarding a potential claim by the United States against the debtor prior to the signing of the confirming order, an order to show cause was issued directing the United States to show cause on April 11, 1947, why an order should not be made limiting the time of the United States "to assert and file in these proceedings any and all claims that it may have against Seeley Tube and Box Company or be forever barred from asserting any such claim against Seeley Tube & Box Company in these proceedings or otherwise * * *." I cannot hold that the verbal representations by debtor's attorney erroneously made during a hearing held more than six months subsequent to the date the proposed debtor duly filed a "Petition and Schedules For Arrangement Under Chapter XI, Statement of Affairs," pursuant to Sections 322, 323, and 324 of the Act, constitute a debt "scheduled by the debtor."

It was held in *Carolina Motor Express Lines, Inc.* v. *Blue & White Service, Inc.*, 192 F. 2d 89, 92 (7th Cir., 1951) that there is no provision in the Bankruptcy Act

"* * * which expressly or by implication gives to our district courts power or authority to extend the time for filing the plan of arrangement proposed by the debtor, or the statement of his executory contracts, or the schedules and statement of affairs required by the Act. * * *

"The fact that in the Chandler Act * * * Congress deleted from Sec. 74 of the Bankruptcy Act, regarding petitions for arrangement, the power there given district courts to extend the time for filing schedules and statements required in such proceedings, forces the conclusion that the District Court has no power to extend the time for filing such plans, statements and schedules in arrangement proceedings."

While in the *Carolina Motor* case, *supra*, schedules were not filed contemporaneously with the petition, and although an amendment effective October 7, 1952 (C. 759, Sec. 29, 66 Stat. 432, 11 U.S.C.A. 724) now grants power to a district court to grant extensions of time for filing schedules under certain circumstances and for "cause shown," nevertheless the reasoning in that opinion applies to the case at bar where proper schedules were duly filed, i.e., the Act neither in 1947 nor now contains any provision for the type of informal, oral scheduling as is contended by the United States.

The claim of the United States obviously is not one of the third types of debt as to which the court retains jurisdiction subsequent to the entering of the order of confirmation, viz., debts which "arise from the rejection of executory contracts by the debtor and are proved within such time as the court may direct." Exhibits A and B attached to the United States' brief are letters dated November 18, 1946 and November 19, 1946, addressed to debtor in Dover, New Jersey, sent by the Ordnance Department Picatinny

Arsenal, Dover, New Jersey, wherein the United States rejected the executory contracts: "Pursuant to Article 5 of Contract (numbered in each letter), notification is hereby given that the right of the (debtor) to proceed with the delivery of the (containers) described in (contract sections) of said contract is terminated." The United States argues that this court should spell out an estoppel against the debtor now claiming that the referee retained jurisdiction of the claim of the United States. The transcript of the March 21, 1947 hearing clearly shows that Freeman and the referee were mistaken in their belief that the claim did "arise from the rejection of executory contracts by the debtor." There is, however, no doctrine of law to the effect that where there was a mistaken belief as to jurisdiction over the subject matter, jurisdiction was thereby conferred where otherwise the court did not have it. If jurisdiction did not exist, as in the case at bar, it could not be conferred either by the consent of the parties, *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), or as the result of a mistaken belief by a party and the court. In Section 369 of the Act, Congress has carefully set forth the requirements for the retention of jurisdiction by the court subsequent to the entry of an order of confirmation, and this court cannot extend the limited power which Congress has granted. See *American Fire & Casualty Co.* v. *Finn, supra.*

The United States further contends that there is ample judicial precedent on the basis of which this court should uphold an informal proof of claim, which is insufficient under the Act, but which was "filed" prior to confirmation of the arrangement and was followed by formal proof. It is argued that the above-mentioned letters sent by the Ordnance Department to the debtor, dated November 18, 1946 and November 19, 1946, were sufficient as proofs of claim and that the proofs subsequently filed on May 8, 1947, "merely added form, not substance, to their contents." With this I cannot agree because:

1. The two letters did not purport to be even informal proofs of claim; the letters merely notified a contract obligee, the debtor, that its right to perform under the contracts was terminated and that it was the intention of the government to exercise its right under the contract to charge Seeley for any market cost in excess of the contract price. Assuming, arguendo, that an informal filing of a proof of claim is proper under the Act, the two letters were not filings of "proofs of claim" and were never intended to be. The rule in this Circuit as to informal filing of proof of claim is set forth in *In Re Super Electric Products Corp.*, 200 F. 2d 790 (3d Cir. 1953). In that case, the claim by the United States was filed four days subsequent to the date the referee entered his order confirming the debtor's amended plan for arrangement with unsecured creditors under Chapter XI. In discussing *J. B. Orcutt Co.* v. *Green*, 204 U.S. 96 (1907), which held that the filing of a proof of claim with a *trustee* in bankruptcy was a sufficient filing to satisfy the Act, the Third Circuit in the *Super Electric* case, *supra*, said at page 793:

> "• • • the exception recognized by the Supreme Court in the Orcutt case may not properly be extended beyond those cases in which a proof of claim has been delivered to the trustee personally or to an employee in the trustee's office who is apparently empowered to transact such office business as the receipt of claims. In Re Supernit, 3 Cir., 1950, 186 F. 2d 130, Chief Judge Biggs of this court pointed out that a strict rule in the matter of proof of claims has always been observed in this circuit and in that case our court applied it to a proceeding under Chapter XI."

The extension of the *Orcutt* case, *supra*, by the Third Circuit Court in the *Super Electric* case, *supra*, cannot apply to the case at bar.

2. If I held that the so-called informal filing of proofs of claim by the United States were proper within the meaning of the Act, the formal proofs were not properly filed until nearly two months subsequent to the date of the confirmation order. The memorandum opinion of the referee contained a finding that "the plan of the debtor, Seeley Tube & Box Co., was confirmed upon the condition that adequate provision had been made for the payment of the government claim in the event that it was determined allowable in an amount not in excess of $94,000.00, as represented by debtor's counsel, Mr. Freeman, at the hearing on confirmation." The Act, however, contains no provision for the entry of a "conditional order." Moreover, it is expressly provided in Sections 367(4), 368, and 369 that upon confirmation of an arrangement the case shall be dismissed unless the court shall retain jurisdiction, if so provided in the arrangement, or unless the debt is one of the three types discussed above.

Finally, it is argued by the United States that the plan of the debtor, as amended, was not an "arrangement" within the meaning of Sections 306 and 356 of the Act. During the Chapter XI proceedings, however, both Judge Smith and the Court of Bankruptcy approved the debtor's plan as a proper arrangement within the meaning of the Act. Never was there any objection raised, even though there was adequate opportunity for any objectors to appear before the referee. Apart from the untimeliness of this objection by the United States and apart from whether there is any substance to the argument, the United States does not now have standing collaterally to attack the validity of the Chapter XI proceedings.

In its argument, the United States stated that this court should invoke its equitable powers, as a Court of Bankruptcy, in favor of the claim *sub judice*. The argument

necessarily implies that there are equitable principles, as distinguished from the vague notions of "equity," which, if applied to the case at bar, would operate in favor of the claimant's position. This contention is insupportable. I am not persuaded by any authority that the equitable powers which a Court of Bankruptcy possesses are such as enable the court to depart from the plain provisions of the Bankruptcy Act, and thus make a ruling which is contrary to or inconsistent with those provisions. The governing rule against claimant's contention is well-established in the case of *Evarts* v. *Eloy Gin Corp.*, 204 F. 2d 712, 715 (9th Cir., 1953):

> "Courts of Bankruptcy are invested with 'such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' Title 11 U.S.C.A. § 11. However, the jurisdiction thus granted is not plenary equity jurisdiction. It is bankruptcy jurisdiction, limited to the express stautory authorizations. The equity jurisdiction conferred by the Act merely empowers the judge or referee in bankruptcy to employ the rules and principles of equity jurisprudence in the exercise of his bankruptcy jurisdiction. Smith v. Chase National Bank, 8 Cir., 1936, 84 F. 2d 608, 614; Billings Credit Men's Ass'n v. Bogert, 9 Cir., 1925, 5 F. 2d 307, 309; Pepper v. Litton, 1939, 308 U.S. 295, 304, 60 S. Ct. 238, 84 L. Ed. 281; 8 C.J.S., Bankruptcy, § 21. Thus, appellant's invocation of the equity powers of the Bankruptcy Court is not sufficient to confer jurisdiction on the Bankruptcy Court of the issues raised here, in the absence of some statutory authority. See 8 Collier on Bankruptcy, 14th Ed., § 3.01."

To the same effect see *In Re Swofford*, 112 F. Supp. 893.

The order of the referee is reversed.

Opinion of Referee in Bankruptcy

CAHILL, Referee

In this matter, the Court is called upon to make a decision concerning the timely filing of a claim by the United States of America in a Chapter XI proceeding. The debtor's petition under Section 322 of the Bankruptcy Act was filed on October 1, 1946. An amended plan of arrangement was filed on February 28, 1947. On October 11, 1946, the United States of America gave notice to the debtor of its intention to terminate contracts W-28-017-ORD-1199 and W-28-017-ORD-1207, because of the debtor's alleged default in performance and to charge the debtor with any excess cost over the price stated in the aforesaid contract. On November 18, 1946, the United States of America terminated the contracts.

In the course of the proceedings, a hearing was conducted on the plan as amended before the Court on notice to the creditors and parties having an interest therein, culminating in its approval and confirmation. The plan as amended was confirmed on March 21, 1947, but at the hearing thereon and before the order of confirmation was signed and issued, the following colloquy took place between (former) Referee Alexander T. Schenck, then presiding, and Mr. Freeman, Attorney for the debtor:

> "Mr. Freeman: I am about to present to your Honor a petition to limit the Picatinny Arsenal to file a claim in this proceeding. I am asking your Honor for an order to show cause to be served upon the Picatinny Arsenal and the United States Attorney, who is the duly recognized representative of any Governmental Agency that may be involved in these proceedings. Mr. Ryan, I do not know whether you have any interest in this application, but I merely want to call it to your attention.

Mr. Ryan: I have no knowledge of that.

The Referee: Is there a claim of the Picatinny Arsenal?

Mr. Freeman: The Picatinny Arsenal may have some claim.

The Referee: Have we put up enough money to meet it?

Mr. Freeman: No.

The Referee: Is there a problem there?

Mr. Freeman: We do not owe them any money, and we want to bring them in. I want to state to your Honor further that the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it.

The Referee: Have you any notion of what they might claim?

Mr. Freeman: We think they may claim $20,000.

The Referee: Have you $20,000 available?

Mr. Freeman: We have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim, in cash * * *

Mr. Freeman: I have a further application to limit the time of the United States of America to file a claim in this proceeding. And I am now handing your Honor a petition and order to show cause.

The Referee: There is a provision in the statute—

Mr. Freeman: Yes, there is.

The Referee: I want to see it.

Mr. Freeman: It is Section 369.

The Referee: Section 369 says under proved debts:

1. Have been proved but not allowed or disallowed, prior to the date of confirmation; or "unliquidated debts."

2. Are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the Court may direct; or "Arising from rejection of executory contracts."

3. Arise from the rejection of executory contracts by the debtor and are proved within such time as the Court may direct.

This comes within the last category.

Mr. Freeman: Yes, that is the last category.

The Referee: Well, I will sign this order and let Miss Robinson fix the date—"

Following the foregoing and before the order confirming the plan was signed, an order to show cause was signed and issued directing the United States of America to show cause on April 11, 1947 why an order should not be made limiting the time of the United States of America "to assert and file in these proceedings any and all claims that it may have against Seeley Tube & Box Company or be forever barred from asserting any such claim against the Seeley Tube & Box Company in these proceedings or otherwise * * *".

At the conclusion of the hearing upon the order to show cause an order was made by the Court on the 14th day of April, 1947, on motion of Bilder, Bilder & Kaufman, appearing by Mr. Freeman, which provided that:

"ORDERED, ADJUDGED AND DECREED:

1. That the United States of America be and it is hereby directed to file with the undersigned Referee in Bankruptcy, Federal Building, Federal Square, Newark, New Jersey, on or before May 9th, 1947, any and all claims which it may have against Seeley Tube & Box Company of Dover, New Jersey, arising out of any and all war supply contracts entered into between the said United States of

America and the said Seeley Tube & Box Company, prior to October 1st, 1946, the date of the commencement of these proceedings, or be forever barred from filing or asserting any and all claims which the said United States of America may have arising out of any war supply contracts entered into between the said United States of America and the said Seeley Tube & Box Company, prior to October 1st, 1946."

Complying with the aforesaid order, the United States of America filed a claim on May 9, 1947 in the amount of $26,818.82, claiming a priority therefor by the provisions of 11 U. S. C. 104. Subsequently, and on March 30, 1949, after damages allegedly sustained by the United States of America as a consequence of debtor's alleged default under the aforesaid contracts had been more accurately determined, the amended proof of claim was filed by the United States of America in the amount of $34,125.03.

The debtor now comes forth and urges that only those creditors who file their claims before confirmation may participate in the distribution and that the Court had no jurisdiction over claims not filed before confirmation, and that the government claim is in this class.

We do not disagree that *ordinarily* a creditor whose claim is not scheduled and who does not file his proof of claim until after confirmation of the plan is barred from participating in the distribution of the moneys deposited by the provision of Section 367 of Chapter XI.

The claim of the United States of America was not scheduled by the debtor and a *formal* proof of claim was not filed by it until the last date provided for in the order of April 14, 1947 to wit: May 9, 1947.

The debtor asserts that Sections 367(3), 369(1) and 370 of the Bankruptcy Act supports its position. These sections are applicable upon confirmation. The debtor also relies upon the rules enunciated and applied in the cases of In re *Super Electric* 200 Fed. (2) 790 and In re *Credit Service* 45 Fed. Supp. 890.

Both of these cases are distinguishable from the subject one. In the *Super case,* at the time of the entry of the order of confirmation, no claim was filed by the government, no provision was made for the filing of such a claim, and no suggestion was made to the Court as to the existence of such a government claim.

In the *Credit Service* case, there was an order of adjudication as a consequence of a voluntary petition under Chapter XI. The facts, upon which the issue was raised therein, do not resemble those in the instant case, even remotely.

In the case at bar, provision was made for the disposition of the government claim at the confirmation. The evidence plainly demonstrates that the Court confirmed the plan upon condition that provision was made for the filing and determination of the government claim.

I find that the plan of the debtor, Seeley Tube & Box Co. was confirmed upon the condition that adequate provision had been made for the payment of the government claim in the event that it was determined allowable in an amount not in excess of $94,000.00, as represented by debtor's counsel, Mr. Freeman, at the hearing on confirmation.

I conclude, therefore, that the claim of the United States of America has been filed within time.

In view of this finding, decision upon the other points raised by the United States of America becomes unnecessary. Counsel will present order.

Dated: December 8, 1953.

Statutes Involved

SECTION 39(A) (3) OF THE BANKRUPTCY ACT
[11 U. S. C. A. § 67(A) (3)]

"(a) Referees shall * * * (3) examine all schedules of property, lists of creditors, and statements of affairs, filed as provided under this title, and cause such as are incomplete and defective to be amended;"

SECTION 324 OF THE BANKRUPTCY ACT
[11 U. S.C. A. § 724]

"The petition shall be accompanied by—

(1) a statement of the executory contracts of the debtor;

(2) the schedules and statement of affairs, if not previously filed; and

(3) payment to the clerk of the fees, if not already paid, required by this title."

SECTION 367(4) OF THE BANKRUPTCY ACT
[11 U.S.C.A. § 767(4)]

"Upon confirmation of an arrangement— * * *

(4) Except as otherwise provided in sections 369 and 370 of this Act, the case shall be dismissed."

SECTION 369(2) OF THE BANKRUPTCY ACT
[11 U.S.C.A. § 769(2)]

"The court shall in any event retain jurisdiction until the final allowance or disallowance of all debts, affected by the arrangement and not barred by the provisions of Section 752 of this title, which— * * *

(2) are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the court may direct;"

Form 48. Original Petition in Proceedings Under Chapter XI

GENERAL ORDER 11. AMENDMENTS

"The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

GENERAL ORDER 38. FORMS

"The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."

Form 48. Original Petition in Proceedings Under Chapter XI

"TO THE HONORABLE , JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF :

The petition of , of in the County of , State of , by occupation a (or engaged in the business of), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at , within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

Form 48. Original Petition in Proceedings Under Chapter XI

3. Your petitioner is insolvent (or unable to pay his debts as they mature), and proposes the following arrangement with his unsecured creditors:

.....

4. *The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.* (Italics ours.)

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

WHEREFORE your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

_____

Petitioner.

_____

Attorney.

Form 48. Original Petition in Proceedings Under Chapter XI

STATE OF ————— }
COUNTY OF ————— } ss.:

I, , the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

_____

Petitioner.

Subscribed and sworn to before me
this day of , 19 .

.....
(Official character)

(Schedules to be annexed corresponding with schedules under Form No. 1.)

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 771

SEELEY TUBE AND BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Referee in Bankruptcy (Pet. 15a-19a)[1] is not reported. The opinion of the District Court (Pet. 7a-14a) is reported at 120 F. Supp. 269. The opinion of the Court of Appeals (Pet. 3a-6a) is reported at 219 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1955 (Pet. 1a). The debtor's

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[1] References to the Appendix to the Petition will be designated "Pet. —a." References to the Record Appendices in the court below will be designated "R. —a" (Government's appendix) and "R. —b" (debtor-petitioner's appendix).

petition for a rehearing was denied on February 9, 1955 (Pet. 2a). The petition for a writ of certiorari was filed on May 6, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a bankruptcy court in a Chapter XI proceeding has jurisdiction over disputed and liquidated claims which have been brought to the referee's attention by counsel for the debtor-in-possession before confirmation and have been proved within the time specifically directed by the referee.

STATUTES INVOLVED

The pertinent provisions of Chapter XI of the Bankruptcy Act, 11 U. S. C. 701 *et seq.*, are as follows:

> Section 367 (11 U. S. C. 767):
>
> Upon confirmation of an arrangement—
>
> * * * * *
>
> (4) except as otherwise provided in sections 769 and 770 of this title, the case shall be dismissed.
>
> Section 369 (11 U.S.C. 769):
>
> The court shall in any event retain jurisdiction until the final allowance or disallowance of all debts affected by the arrangement which—
>
> (1) have been proved, but not allowed or disallowed, prior to the date of confirmation; or

(2) are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the court may direct; or

(3) arise from the rejection of executory contracts by the debtor and are proved within such time as the court may direct.

STATEMENT

The debtor filed a petition for arrangement under Chapter XI of the Bankruptcy Act (11 U. S. C. 701 *et seq.*) on October 1, 1946 (R. 1b). Two contracts with the Government's Picatinny Arsenal, from which the claims now in dispute arose, were listed in the statement of executory contracts required by Section 324(1) of the Act (11 U. S. C. 724(1)) (R. 2a), but as they had not yet been declared in default, no claims thereon were included in the schedules accompanying the petition. On October 11, 1946, the United States gave notice to the debtor of its intention to terminate these two contracts because of the debtor's default in performance (R. 27a-28a), and on November 18 and 19, 1946, the contracts were terminated, the Government reserving the right in accordance with the terms of the contracts to hold the debtor liable for damages (R. 25a-27a). In reletting these contracts, the Government claimed that it was required to agree to a price in excess of that for which the debtor had promised delivery (R. 13a-14a, 16a-17a).

On February 28, 1947, the debtor filed an amended plan of arrangement (R. 3a-5a), providing for the payment in cash of all unsecured debts without any reduction in amount or extension of

time for payment. A hearing on the confirmation of this plan was held by the referee on March 21, 1947.[2] The United States was not represented in connection with the present claims,[3] but the matter was brought to the referee's attention by the debtor's own counsel. Early in the hearing, he indicated that he would ask that the time in which Picatinny Arsenal might file a claim be limited by the referee. The following colloquy occurred (R. 8a-9a):

The REFEREE: Is there a claim of the Picatinny Arsenal?

Mr. FREEMAN [counsel for the debtor]: The Picatinny Arsenal may have some claim.

The REFEREE: Have we put up enough money to meet it?

Mr. FREEMAN: No.

The REFEREE: Is there a problem there?

Mr. FREEMAN: We do not owe them any money,

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[2] Four days before, in his Petition for Allowances, the debtor's counsel had called the referee's attention to the existence of the Government's claims (R. 7a):

> The services still to be rendered further include a re-examination of various claims filed in the proceeding and applications to the Court to determine the extent and validity of some of such claims filed herein.
>
> The War Department has advised the debtor company that it has a claim against the debtor arising out of an alleged termination of a contract in the sum of approximately $20,000.00. This claim when finally asserted will be vigorously contested by the debtor.

[3] A Bureau of Internal Revenue attorney was present in connection with the Government's tax claim (R. 8a). However, he had no knowledge of the present claims (R. 9a) nor was he authorized to represent the Government with respect thereto.

and we want to bring them in. I want to state to your Honor further that the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it.

The REFEREE: Have you any notion of what they might claim?

Mr. FREEMAN: We think they may claim $20,000.

The REFEREE: Have you $20,000 available?

Mr. FREEMAN: We have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim, in cash * * *.

Later in the hearing, the following was said (R. 9a-10a):

Mr. FREEMAN: I have a further application to limit the time of the United States of America to file a claim in this proceeding. And I am now handing your Honor a petition and order to show cause.

The REFEREE: There is a provision in the statute——

Mr. FREEMAN: Yes, there is.

The REFEREE: I want to see it.

Mr. FREEMAN: It is Section 369.

The REFEREE: Section 369 says under proved debts:

> 1. Have been proved but not allowed or disallowed, prior to the date of confirmation; or "unliquidated debts."
>
> 2. Are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the Court may direct; or

"Arising from rejection of executory contracts."

3. Arise from the rejection of executory contracts by the debtor and are proved within such time as the Court may direct.

This comes within the last category.

Mr. FREEMAN: Yes, that is the last category.

The REFEREE: Well, I will sign this order * * *.

An order that the Government show cause why the time for filing its claim should not be limited (R. 10a) was signed before the plan was confirmed (Pet. 17a). This limit was set, after a hearing, as May 9, 1947 (R. 10a-12a), and a proof of claim and an amended proof of claim were filed on that date (R. 13a-19a, 21a-22a). Subsequently, on March 30, 1949, these proofs of claim were amended to demand $1,192.33 on one contract and $32,933.71 on the other (R. 22a).

On February 17, 1950, the debtor filed a petition to have these claims as amended reexamined and barred (R. 19a-24a). The referee denied this petition (R. 27a-33a; Pet. 15a-19a) because he found that (R. 32a; Pet. 19a):

> * * * provision was made for the disposition of the government claim at the confirmation. The evidence plainly demonstrates that the Court confirmed the plan upon condition that provision was made for the filing and determination of the government claim.

On a petition for review, the District Court reversed, holding that the claims were barred by Sec-

tion 367(4), *supra*, p. 2, on the grounds that no proof of claim had been filed prior to confirmation and that no authority existed for the informal scheduling of claims (Pet. 7a-14a).

On appeal, the court below reversed. Without deciding whether the requirements attending the filing of informal proofs of claim had been satisfied, the court held that "the disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was * * * in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules" (Pet. 5a), further observing that "Certainly the informal scheduling of the claim disclosed by the record served all the purposes in this case which a more formal procedure would have accomplished" (Pet. 6a).

ARGUMENT

Petitioner has emerged from Chapter XI proceedings with substantial capital in excess of all claims against it, including the present disputed claims of the United States. All unsecured creditors, except the United States, have received timely payment in full. As to the Government's claims, petitioner contends that the bankruptcy court is without jurisdiction even to consider their validity because although the referee was induced to confirm the arrangement on the representation by petitioner's counsel that the Government's claims could be filed thereafter, the presentation of those claims was, according to petitioner, barred by the confirmation of the arrangement. Specifically, peti-

tioner seeks to defeat the Government's claims notwithstanding the facts that (1) these claims were brought to the attention of the referee by the petitioner's own counsel, (2) counsel expressed the petitioner's desire "to bring [the Government] in" (R. 29a), and obtained an order limiting the time in which the claims could be proved, and (3) the plan was confirmed solely on the representation that provision could be made for the filing and determination of the Government's claims.

The technical arguments on which petitioner seeks to predicate this inequitable result are without merit. For it is settled that a bankruptcy court is "a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence", and that such equitable powers may be "invoked to the end * * * that substance will not give way to form, that technical considerations will not prevent substantial justice from being done" (*Pepper* v. *Litton*, 308 U. S. 295, 304-305). These principles, applied to the narrow and unusual circumstances of this case, fully justified the conclusion of the court below that since "the informal scheduling * * * served all the purposes * * * which a more formal procedure would have accomplished" (Pet. 6a), the debtor's schedules should be regarded as informally amended to include the Government's claims so that they were within the jurisdiction of the bankruptcy court to entertain and allow. That conclusion correctly applies Section 369(2) of the Bankruptcy Act. Turning on the particular facts of this case, it presents no conflict and no basis for review by this Court.

Section 369(2) (*supra*, p. 3), vests jurisdiction in the bankruptcy court over debts which "are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the court may direct." There is no question here that the first two elements were satisfied: the Government's claims were disputed, and they were proved within the time fixed by the referee in accordance with the petitioner's own request and suggestion. As to the third requirement, the court below found that the claims were scheduled as a result of the disclosures of the petitioner's counsel at the confirmation hearing and the action which the referee took on the representations made by petitioner's counsel. This finding is clearly justified by the facts.

Section 324 of the Bankruptcy Act (11 U. S. C. 724) provides for filing schedules and a statement of the debtor's affairs along with the petition for an arrangement, but the times for filing the schedules may be extended by the court.[4] Moreover, amendments may be permitted at any time, and it is part of the referee's duties to examine the schedules and "cause such as are incomplete and defective to be amended" (Section 39(a)(3), 11 U. S. C. 67(a)(3)). Indeed, to protect a creditor, amendments may be made after confirmation. *In re Everick Art Corp.*, 39 F. 2d 765 (C. A. 2); *In re Watman*, 291 Fed. 886 (S. D. N. Y.). Thus, as the

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[4] This is now expressly provided by an amendment passed in 1952, 66 Stat. 432, but the legislative history indicates that the amendment was intended to regularize general practice. H. Rep. No. 2320, 82d Cong., 2d Sess., pp. 18-19; Sen. Rep. No. 1395, 82d Cong., 2d Sess., pp. 19-20.

court below pointed out (Pet. 5a), petitioner's counsel was doing no more than his duty in bringing the existence of the Government's possible claims to the referee's attention, and in so doing he was in effect amending the petitioner's schedules.

Petitioner attacks this conclusion by arguing that the claims were indefinite at the time of the confirmation hearing (see, *e. g.*, Pet. 12). But even if the claims were indefinite, this does not mean that they could not be scheduled. For the scheduling of a claim is not the admission of a liability; it simply calls to the court's attention the fact that the claim exists. Surely, if the Government had terminated these contracts before the filing of the petition for an arrangement, the inclusion of its possible claims in the original schedules would not have been improper.

Petitioner further argues that its counsel's action could not be considered an informal scheduling because, it asserts, the Government's claims were not presented to the referee in writing under oath nor entered by him in the formal manner prescribed by the General Orders (Pet. 7-8). One answer to this might be that the referee's failure to require the formal procedure was a result of his reliance on the representation of petitioner's counsel that jurisdiction would continue in any event under Section 369(3) (*supra*, p. 3).[5] A

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[5] Section 369(3) provides that jurisdiction will be retained over claims arising from the rejection of executory contracts *by the debtor*. On the strength of the assertion that the Government's claims fell within this section the referee fixed a time for proving those claims. Had the assertion not been made, the referee might have held up confirmation until the claims

more important factor in favor of the holding that claims may be considered to have been informally scheduled when the interests of justice so demand is the fact that such a doctrine has long been accepted in connection with the filing of proofs of claim.[6] The same considerations which have led courts to accept informal proofs of claim when otherwise a creditor would be excluded from participation in the proceeds of the bankrupt estate argue in favor of recognizing informal scheduling. Moreover, as schedules are largely required for notice purposes, these considerations are particu-

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were scheduled or filed. Had he not done so, the Government could have petitioned for review of the confirmation order on the grounds that the arrangement did not "include provisions modifying or altering the rights of unsecured creditors generally or of some class of them." Section 356, 11 U.S.C. 756. See *Continental Insurance Co.* v. *Louisiana Oil Refining Corp.*, 89 F. 2d 333, 336 (C.A. 5).

[6] The courts have long recognized informal proofs of claim, which, even if they are themselves ineffective, may be amended to state a valid claim at a time when the original proof of claim could not be filed. *J. B. Orcutt Co.* v. *Green*, 204 U.S. 96; *In re High Point Seating Co.*, 181 F. 2d 747 (C.A. 2); *In re Kessler*, 184 Fed. 51 (C.A. 2); *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 190 (C.A. 9). The Government contended below that if the facts of this case do not support the conclusion that its claims were scheduled, they do indicate that informal proofs of claim were filed, over which jurisdiction was retained under Section 369(1) of the Act (11 U.S.C. 769(1)), and that the formal claims of May 9, 1947, were simply permissible amendments thereto, cf. *Hutchinson* v. *Otis, Wilcox & Co.*, 190 U.S. 552. The decisions in *In re High Point Seating Co.*, and *In re Lipman*, 65 F. 2d 366 (C.A. 2), were cited as particularly analogous to this case. The Court of Appeals did not rule on this issue, but we submit that it provides an alternative ground in support of the decision below that the bankruptcy court retained jurisdiction after confirmation to rule on the Government's claims.

larly pertinent where, as here, such informal scheduling occurs in an open formal hearing and where no one has been prejudiced thereby.

Finally, the fear expressed by the petitioner that the holding below will "make it possibe for creditors in countless cases" to contend that their claims have been scheduled by reason of "statements made at one hearing or another" (Pet. 9) are clearly exaggerated. Far from applying generally to situations where claims have simply been mentioned in passing, the holding below relates only to the unusual facts of this case. As shown *supra*, pp. 4-6, the existence of the Government's claims was specifically called to the referee's attention; the petitioner's counsel expressed a desire to bring the Government in; and the referee, at the express request of the petitioner's counsel, fixed the time within which the claims must be proved in an official order. The decision below passed only on the issue presented by these facts, was clearly correct in light thereof, and does not present a question of general importance which calls for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 61

IN THE MATTER

of

SEELEY TUBE AND BOX COMPANY,

Debtor-Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR DEBTOR-PETITIONER

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REPLY ARGUMENT

In its *Argument,* respondent says (Brief 7): "the referee was induced to confirm the arrangement on the representation by petitioner's counsel that the Government's claims could be filed thereafter", and further on respondent says (Brief 8): "the plan was confirmed solely on the representation that provision could be made for the filing and determination of the Government's claims." These assertions, however, are contrary to fact.

A false basis for these untrue assertions is furnished by the way in which respondent presents the pertinent colloquy between the Referee and the attorney for the debtor. Respondent (Brief 4) begins to quote from this colloquy at a point which makes it seems as if the Referee initiated the colloquy with an inquiry as to a claim of the respondent, viz: "Is there a claim of the Picatinny Arsenal?" The truth is that the colloquy began with a statement *by the debtor's attorney,* viz:

> "Mr. Freeman: I am about to present to your Honor a petition to limit the Picatinny Arsenal to file a claim in this proceeding. I am asking your Honor for an order to show cause to be served upon the Picatinny Arsenal and the United States Attorney, who is the duly recognized representative of any Governmental Agency that may be involved in these proceedings. Mr. Ryan, I do not know whether you have any interest in this application, but I merely want to call it to your attention." (R. 15a)

From this it is manifest that debtor's attorney was not making a representation to induce the Referee to confirm the arrangement which otherwise the Referee would not have confirmed. What debtor's attorney was doing was to get the Referee to fix a time for respondent to make proof of a claim which, under the express language of Section 369, *would survive confirmation;* and the Referee plainly showed that he understood the government's (possible) claim *to be one of that nature* (R. 16a and R. 17a). What re-

spondent is attempting to do then is to change an actual case of *mutual mistake* on the part of the Referee and the debtor's attorney into an imagined case of a knowingly false representation made by the debtor's attorney to the Referee and a reliance of the Referee on such false representation.

Indeed, a direct refutation of respondent's above said misstatements is furnished by the following statement made in respondent's own brief filed with the court below (Brief 12):

> "The Government was not represented with respect to these claims at the confirmation hearing, *and if the debtor's counsel had remained silent with respect to the claims now in dispute, the plan might have been confirmed, and those claims thereby discharged.*" (Our italics.)

In other words, respondent, in its brief to the court below, frankly acknowledged that the Referee would have confirmed the arrangement without any mention being made of respondent's unasserted possible claim, and that in such case respondent's claim would have been discharged. So far then from being an inducement of the Referee's confirmation of the arrangement, the debtor's attorney's mentioning of the government's unasserted possible claim was merely a gratuitous incident of the hearing on confirmation, arising from a misapprehension of the nature of that claim by the debtor's attorney.

Respondent argues (Brief 9) as if the statements made by debtor's attorney with reference to a possible claim of respondent were made for the very purpose of *informally amending the schedules* to include that claim. In doing this, respondent plainly ignores the crucial fact that the debtor's attorney's mentioning of the government's possible claim was prompted solely by the fact that he mistakenly supposed the possible claim of the respondent to be one in the category of Section 369(3) and therefore *one which did not require scheduling but did require the*

fixing of a time for proof after confirmation. Thus, it is manifest that what debtor's attorney intended to do was not to informally amend the debtor's schedules but was only to have the Referee fix a time for the proof of a possible claim which he (debtor's attorney) mistakenly supposed was in that category of claims under Section 369 *which did not need to be scheduled.* Thus, respondent's argument attempts to change the actual situation in this case into a fundamentally different imagined situation.

In a footnote (Brief 10) respondent plainly acknowledges that both the Referee and debtor's attorney mistakenly believed the possible claim of respondent to be within Section 369(3). But respondent goes on to say:

> "Had the assertion not been made, the referee *might* have held up confirmation until the claims were scheduled or filed."

This doubly hypothetical assertion is sufficiently answered by a far less hypothetical assertion by us that if debtor's attorney had not mistakenly believed that respondent's possible claim was in the category of Section 369(3) and therefore one which would survive confirmation, he doubtless *would not have mentioned* this (possible) claim, in which event, to quote from respondent's brief filed with the lower court (Brief 12): "if the debtor's counsel had remained silent with respect to the claims now in dispute, the plan might have been confirmed, and those claims thereby discharged."

In the same footnote (Brief 11), respondent, in substance, says that if the debtor's attorney had remained silent as to respondent's (possible) claim, "the Government *could have* petitioned for review of the confirmation order on the ground that the arrangement did not 'include provisions modifying or altering the rights of unsecured creditors generally or of some class of them.' " It is sufficient to say of this contention that it is not germane to the question before this Court. But even if it were germane, this contention would be disposed of by the fact

that respondent did not file a petition to review the Referee's order of confirmation; and the hypothetical contention that respondent might have filed such a petition if what happened at the hearing had not happened, is one which can scarcely avail respondent in this proceeding.

Respondent contends (Brief 10 and 11) that a reason for "holding that claims may be considered to have been informally scheduled when the interests of justice so demand is the fact that such a doctrine has long been accepted in connection with the filing of proofs of claim." As supposed authority, respondent cites cases in which the filing of an informal *proof of claim* was held to be effective. But these cases do not support respondent's argument-by-analogy. In *J. B. Orcutt Company* v. *Green*, 204 U. S. 96, it was held that the presentation and delivery of *a proof of claim* to the trustee in bankruptcy within a year after the adjudication is a sufficient filing within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3443), §57, when read in connection with general orders in bankruptcy No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. In the case of *In re High Point Seating Co.*, 181 F. 2d 747, it was held that where public accountants retained by debtor pursuant to an order made and entered in proceeding under Bankruptcy Act for an arrangement with creditors, wrote to a creditor and requested submission of a detailed statement of the indebtedness, and creditor sent such a statement to accountants, but creditor's claim was inadvertently omitted from debtor's schedule, and creditor had no knowledge of arrangement until after plan had been confirmed, creditor's claim, though not scheduled, was sufficiently proved to be perfected through an amendment. Bankr. Act, §§301 *et seq.*, 367, 369, 370, 11 U. S. C. A. §§701 *et seq.*, 767, 769, 770. The court said:

> "But unverified *written claims* of a creditor have been treated by this court as capable of amendment if

> presented in time. Here, there was a *written claim* presented to the auditors appointed by the court at the instance of the debtors to collocate the indebtedness of High Point Seating Company, Inc. *Upon the basis of this writing the report of the auditors set forth the claim, and the report was filed by them with the referee* on August 2, 1947. * * * " (Our italics.)

and further on the court said:

> "*In re Kessler,* 2 Cir., 184 F. 51, 52, we sustained and allowed to be put in formal proof *a claim which had been submitted without verification to an assignee for the benefit of creditors under the state law, and was thereafter transmitted by the assignee to a receiver in bankruptcy, and remained in his possession as receiver and thereafter as trustee.* * * * " (Our italics.)

This cited case of *In re Kessler* is the third case mentioned by respondent in its said footnote. In the case of *In re Patterson-MacDonald Shipbuilding Co.,* 293 F. 190, *a letter written to a trustee,* who was occupying premises leased to bankrupt, several months after the adjudication, by the lessor, inclosing official statement of delinquent taxes on the property, which under the lease bankrupt was obligated to pay, and asking their payment, was *held* to contain the essentials of a claim against the estate, sufficient to permit its amendment into a formal claim when more than a year after the adjudication, the trustee surrendered the leased premises. The court said:

> "That the letter sets out, and was intended as, a claim against the estate, seems clear. Certainly it was not against the trustee as an individual. True, it does not 'meet the requirement' of the statutory proof of claim. But that is the justification for and not a bar to amendment. It does, however, meet most of the requirements and contains most of the essentials prescribed by statute and order in proof of claim—

> *enough of both to give to the letter the substance of a proof of claim,* and to warrant amendment to supply the absent items of proof. It is (1) a statement in writing; (2) signed by a creditor, the term including an agent; (3) setting forth the claim; (4) the consideration therefor; (5) that no payments have been made thereon; (6) that the sum claimed is justly owing from the bankrupt to the creditor, if not paid to the tax collector; and (7) with defective title of the bankruptcy proceedings; and it omits only title of court, verification, whether secured, and why made by agent. * * *" (Our italics.)

Obviously the foregoing cases do not warrant the proposition that the oral mention of a (possible) claim at a hearing before the Referee can be held to be the legal equivalent of an amendment of a debtor's schedules and to constitute such an amendment.

In concluding its argument, respondent says (Brief 12):

> "Finally, the fear expressed by the petitioner that the holding below will 'make it possible for creditors in countless cases' to contend that their claims have been scheduled by reason of 'statements made at one hearing or another' (Pet. 9) are clearly exaggerated. Far from applying generally to situations where claims have simply been mentioned in passing, the *holding below relates only to the unusual facts of this case.*"

This, we submit is not answering argument but merely a bold prediction by respondent of what the courts will hold in the "countless cases" which we believe can reasonably be expected to be the outcome of the holding of the court below.

Respectfully submitted,

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